SIERRA CLUB
CALIFORNIA

November 16, 1998

Mr. John Munn
California Department of Forestry
1416 – 9th Street
Sacramento, CA 95814

Mr. Bruce Halstead
U.S. Fish and Wildlife Service
1125 – 16th Street
Arcata, CA 95521

Re: Comments on Pacific Lumber Company Application for Incidental Take Permit Nos. PRT-828950 and 1157 and Sustained Yield Plan No. 96-002

Gentlemen:

I write on behalf of Sierra Club and my comments are in addition to other comments submitted on our behalf. For well over a decade Sierra Club members have been part of the struggle to save Headwaters Forest. We have been involved in virtually every aspect of that effort. In spite of grave reservations about the negotiated purchase agreement for part of the forest, we have worked with the Administration, the wildlife agencies, the California Legislature, and through every available venue to craft a satisfactory solution.

When the Headwaters Forest Agreement was announced in September 1996, there was great concern that the acquisition was tied to approval of a permit for the Pacific Lumber Company to kill endangered species. Even so, we hoped that the proposed Habitat Conservation Plan (HCP) and Sustained Yield Plan (SYP) would be sufficiently protective to warrant approval. On behalf of Sierra Club, the Environmental Protection Information Center (EPIC), and the Pacific Rivers Counsel, a multi-faceted team of technical experts has completed a thorough review of the draft HCP/SYP. Their findings are clear and unambiguous:

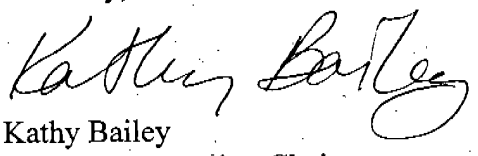
Approval of the proposed Pacific Lumber HCP/ SYP would be a disaster for the redwood region.

1414 K Street, Ste. 300 Sacramento, CA 95814 (916) 557-1100 FAX (916) 557-9669

Unfortunately the terms of the federal appropriation may require approval of the federal permit to kill endangered species and approval of the state logging plan prior to release of the acquisition funding. Although Headwaters Forest should be protected as public land, this price is too high. We are not referring to the hundreds of millions of dollars which the governments have agreed to pay. Rather, if the draft HCP/SYP were to be approved it would likely lead to the extinction of the marbled murrelet which nests in the ancient forests. It would be the death knell for coastal salmon, which depend on clean, clear water. It would contribute to the regional elimination of Northern spotted owls. And it would lock in place for 50 years or more a clearcut logging plan that would eliminate the redwood forest as we know it and many plants and animal species which have evolved to live in that rich, moist, dark, tall, wondrous forest.

It is your responsibility to uphold the law and help conserve the natural world. Approving these plans would do neither. We strongly urge you to deny approval of the Pacific Lumber HCP/ SYP.

Sincerely,



Kathy Bailey
Forest Conservation Chair

November 16, 1998

To: Mr. Halstead and Mr. Munn
Fr: Paul Mason, EPIC
RE: The Pacific Lumber HCP/SYP, (PRT-828950 and 1157 and SYP 96-002)

Dear Sirs,

Although I had originally had grand aspirations of writing you an extensive comment letter of my own, I believe that our six attorneys and 20 technical experts have covered those bases pretty well. Nonetheless, I do have a few opinions that I feel compelled to share with you.

The Habitat Conservation Plan process is a sham. It is not about conserving habitat, it is about allowing rapicious corporations to kill endangered species and destroy habitat that otherwise would be protected by law. The entire premise that you can kill species and destroy their habitat in order to save them is counter-intuitive and wrong. The HCP process is a convienient political solution to a simple biological problem.

Up to this point, the Clinton administration has generally had very token resistance to these long term, species-killing contracts. Those days are over. We will not sit idly by and have the redwood region turned into a fiber farm in order to allow the Headwaters acquisition to proceed. The HCP as currently proposed makes a mockery of "science", and represents nothing more than a total forest liquidation strategy by one of the worst corporations in America.

You can expect continued vigorous opposition to this HCP. I look forward to your response to the comments submitted to you by our attorneys and biological experts.

For the Wild Forests,

Paul Mason
President, EPIC

ENVIRONMENTAL LAW FOUNDATION

1736 Franklin Street, 8th Floor, Oakland, California 94612 ▪ 510/208-4555 ▪ Fax 510/465-6248 ▪ elf1@igc.apc.org

November 16, 1998

RECEIVED
NOV 16 1998
BY: JRM

VIA HAND DELIVERY

Mr. Bruce Halstead
U.S. Fish and Wildlife Service
1125 16th Street, Room 209
Arcata, CA 95521

Mr. John Munn
California Department of Forestry
1416 Ninth Street
Sacramento, CA 95814

Re: Comments on Pacific Lumber Company Application for Incidental Take Permit Nos. PRT-828950 and 1157 and Sustained Yield Plan No. 96-002

Dear Mr. Halstead and Mr. Munn:

The Environmental Protection Information Center (EPIC) and the Sierra Club submit the following comments on Pacific Lumber Company's (PALCO's) application to:

(1) the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) for approval of a habitat conservation plan (HCP) and issuance of incidental take permits (ITPs) pursuant to section 10(a) of the federal Endangered Species Act (ESA) and its implementing regulations;

(2) the California Department of Fish and Game (CDFG) for issuance of an ITP pursuant to section 2081 of the California Endangered Species Act (CESA); and

(3) the California Department of Forestry (CDF) for approval of a long-term sustained yield plan (SYP) pursuant to the California Forest Practices Act (FPA) and its implementing regulations.

These comments are intended to supplement the many other comments being submitted by various other persons on EPIC's and Sierra Club's behalf.

I. HCP Vol. IV, Part C: Northern Spotted Owl Conservation Plan

A. The HCP Does Not Comply With Section 10(a) of ESA and Section 2081 of CESA

The USFWS cannot issue an ITP to PALCO because the Northern Spotted Owl Conservation Plan (NSOCP) in the HCP does not meet the statutory requirements regarding the content of an HCP, nor does it satisfy the criteria for issuance of an ITP under federal and state law.

1. The contents of the HCP do not meet statutory requirements

First and foremost, the HCP does not meet the criteria of section 10(a)(2)(A) of the federal ESA. That section provides that an ITP may *not* be issued *unless* the HCP specifies: (1) the impact that will likely result from the taking; (2) what steps the applicant will take to minimize and mitigate such impacts and the funding that will be available to implement such steps; and (3) what alternatives to the taking the applicant considered and the reasons why such alternatives are not being proposed. (16 U.S.C. § 1539(a)(2)(A); 50 C.F.R. § 17.32(b)(1)(iii)(C).) Because the does not sufficiently address all of these required elements, USFWS and NMFS cannot issue an ITP to PALCO. ELF-1

a. The HCP fails to adequately identify project impacts

The USFWS/NMFS HCP Handbook (Nov. 1996) (hereafter "HCP Handbook") explains that "[f]our subtasks must be completed to determine the likely effects of a project or activity" on listed species, including: (1) collection and synthesis of biological data on covered species; (2) identifying activities that are likely to result in incidental take; and (3) quantifying anticipated take levels. (Handbook, p. 3-12.) The HCP does none of these things. The HCP omits discussion of or misinterprets current and relevant data on the status of NSO populations in general and on PALCO lands. (*See* comments of NSO experts Armand Gonzalez, Alan Franklin, Peter Carlson, and Joyce Kadoch - Exhibits 1-3, 15). The HCP also does not adequately describe how various timber harvesting activities are likely to result in incidental take, but rather contains only the most cursory and incomplete discussion of potential take. ELF-2

Further, the HCP does not adequately quantify the level of incidental take to be authorized. The HCP Handbook states that, in order to accurately quantify the level of incidental take, the HCP must determine: (1) how incidental take will be calculated; (2) the level of incidental take and related impacts expected to result from proposed activities; and (3) level of incidental take that the ITP will authorize. (HCP Handbook, p. 3-14.) The HCP fails to explain how take will be calculated. Indeed, the level of take cannot be accurately calculated because

the HCP fails to include an accurate, field-checked baseline of current NSO populations and admits that "[i]nformation is incomplete on numbers of reproductive sites." (NSOCP, p. 3, HCP Vol. IV, Part C.) The HCP also relies on unreviewable, unpublished USFWS data and inaccurate assumptions regarding the Northwest Forest Plan and the level of protection provided by other HCPs to justify a higher existing baseline.

ELF-2 CON.

In addition, the HCP does not adequately define the level of incidental take that will occur or be authorized. The HCP Handbook recommends that a map of proposed activities be overlain on maps of actual species distribution in the plan area in order to determine the level of take. This was not done. Instead, habitat and species distribution are roughly estimated through a "crosswalk" from timber typing to the California Wildlife Habitat Relationship System. This crosswalk is inadequately explained and justified. Therefore its accuracy and usefulness in determining actual distribution of NSO on PALCO lands is impossible to evaluate. More importantly, the crosswalk is a poor substitute for field surveys keyed to overlay maps. (*See* Exhibits 1 and 2.) Further, both Peter Carlson and Alan Franklin opine that the level of take that actually occurs under the plan could be much greater than the projected 33%. There is no cap on incidental take.

Finally, for the reasons discussed in section V of this letter and the comment letters of EIS/EIR consultant Richard Grassetti and NSO experts Armand Gonzalez, Alan Franklin, Peter Carlson and Joyce Kadoch, the HCP does not adequately identify the direct and indirect impacts of the proposed taking of NSO under the plan, and fails entirely to address cumulative impacts. (Exhibits 1-3, 5, 15.)

b. <u>The HCP fails adequately to mitigate project impacts and to identify a source of funding for mitigation</u>

ELF-3

The HCP Handbook states that an HCP mitigation program must be based on sound biological rationale, and must address the program's consistency with any applicable recovery plan. (HCP Handbook, p. 3-19 - 3-20.) The Handbook also states that an adaptive management strategy should be included in the HCP "when there are significant questions . . . regarding an HCP's initial mitigation strategy. The Services should not approve an HCP using conservation strategies that have a low likelihood of success." (*Id.*, p. 3-24.) Except in unusual circumstances, mitigation should be provided prior to habitat loss.

For the reasons discussed below and in sections I.A.2.a and V of this letter and the comment letters of EIS consultant Richard Grassetti and NSO experts Armand Gonzalez, Alan Franklin, Peter Carlson and Joyce Kadoch, the HCP does not contain sufficient measures to mitigate the impacts of the proposed taking and is wholly lacking in scientific justification. (Exhibits 1-3, 5, 15.) The HCP's mitigation program is not based on sound (indeed *any*)

ELF-3 con.

biological rationale, does not adequately address the program's consistency with the NSO recovery plan, does not include adequate adaptive management measures, and does not provide mitigation prior to habitat loss, and overall has a very low likelihood of success.

The HCP's mitigation program is also inconsistent with other NSO mitigation programs for private and public lands. The Simpson Timber Company (STCO) HCP, for example, protects approximately 30% of the owl sites on STCO land (as opposed to 12% of sites on PALCO land - two of which are located in the public acquisition area and should not be counted as mitigation), and caps the total amount of take that can occur on STCO land (the PALCO HCP contains no specific cap). (Exhibits 1 and 2.) Even the more stringent mitigation program in the STCO HCP has been described as "arbitrary" and "lacking data, analyses and logic in defense of the sufficiency" of the program. (Bingham and Noon (1997), Exhibit 2.)

The proposed 4(d) rule for NSO, though still inadequate, is likewise far more stringent than the PALCO HCP. The 4(d) rule proposes retention of 70 acres of suitable habitat around NSO nesting and roosting sites and retention of 40% of overall suitable NSO habitat, which is nearly *four times* the 18 acre and 10% retention standards proposed in the PALCO HCP. (60 Fed. Reg. 9484, Exhibit 8; *see also* Exhibit 15, Memorandum to Phil Detrich from Dennis Mackey, Apr. 4, 1997, re NSO Activity Center and Nest Site Protections in Washington and Oregon HCPs (70 acre or more protection for NSO nest sites in other approved and pending HCPs).) Even this far greater NSO habitat retention standard is at best only adequate for *short term* maintenance of owls, but does not allow for NSO recovery over the long term. (Comments of Peter Carlson and Bruce Bingham on "Draft Environmental Alternatives Analysis for a 4(d) Rule for the Conservation of the NSO on Non-Federal Lands," May 1996, Exhibit 8.) Other research suggests that core areas of up to 450 acres are needed to ensure that NSOs will not abandon nest sites, and will successfully reproduce. (*Id.*)

The HCP's mitigation program also is inconsistent with the USFWS' own procedures for ESA compliance with respect to NSO. (*See* Exhibit 14.) These procedures recommend the following approach to avoid or reduce incidental take of NSO:

(1) Conduct NSO surveys during the breeding season and prior to any harvest activity according to U.S. Forest Service protocols;

(2) Avoid any harvest activity that results in less than 70 acres of the best available suitable owl habitat encompassing the nest site and/or activity center of a pair of NSOs;

(3) Avoid any harvest activity which results in less than 500 acres of suitable habitat within a 0.7 mile radius (1000 acres) of a nest site and/or activity center;

(4) Avoid any harvest activity which results in less than a 40% coverage of suitable NSO habitat within a circle with a radius centered on a nest site and/or activity center. (Ex. 14. Procedures Leading to ESA Compliance for the NSO, USFWS Region 1, July 1990, p. 10.)

ELF-3 CON.

Even assuming the mitigation measures provided in the HCP are theoretically adequate to mitigate impacts of the ITP on NSO (which they clearly are not), there is no mechanism for ensuring that these measures will be effectively carried out. (This violates section 10(a)(2)(B) of the ESA and 50 C.F.R. § 17.32(b)(2)(vi), which require the permittee to provide assurances that the plan will be effectively implemented.)

For example, the plan does not specify how it will ensure that 10% of the forested landscape will be maintained in suitable NSO habitat. Furthermore, the there is no mechanism for ensuring that this 10% will be high quality nesting habitat. The plan expressly states that "[t]his 10% standard may include high, medium and low suitability ratings." (NSOCP, p. 10, HCP Vol. IV, Part C.) As Alan Franklin points out, simply relying on late seral projections will not assure high quality nesting habitat, because all or most of the late seral forests on PALCO land (outside of the MMCAs) could be in narrow RMZs which will not provide suitable nesting habitat. The MMCAs are also not necessarily adequate for nesting. Further, there is nothing in the plan which assures maintenance of the estimated 100 pairs of nesting owls, or for ensuring that the baseline is not reduced by more than one third.

Another example of the lack of assurances as to the success of the HCP is the assumption that logging 16 of 20 so-called "inactive" nesting sites within the first five years of the plan will not result in direct impacts to NSO. The HCP's methods for determining that the sites are currently inactive and assumptions regarding inactivity are contradicted by the scientific literature, as discussed in the comments of Alan Franklin, Peter Carlson and Joyce Kadoch. The HCP also contains a number of internally inconsistent statements, such as: high quality nesting habitat will remain at or above 21% (vs. 10%); the HCP will maintain a "floor" of 100 (vs. 93) nesting NSO pairs; and PALCO lands currently contain an estimated 147 (vs. 150) NSO pairs.

Finally, the HCP completely fails to identify a source of funding for the minimal mitigation measures in the plan, contrary to the requirement of section 10(a) and its implementing regulations and section 2081.

c. <u>The HCP fails to justify its rejection of other alternatives</u>

See comments on HCP Vol IV, Section G.

ELF-4

2. The HCP does not meet the criteria for issuance of an ITP

a. The HCP fails to minimize and mitigate the impacts on the NSO to the maximum extent practicable, and does not ensure adequate funding will be available to implement these measures

ELF-5

Section 10(a)(2)(B) of the ESA and section 2081(b) of CESA prohibit the USFWS and CDFG from issuing an ITP if: (1) the applicant will not "minimize and mitigate" the impacts of the proposed taking "to the maximum extent practicable"; or (2) the applicant has not ensured that adequate funding will be provided to implement the plan's mitigation and monitoring measures. (*See* 16 U.S.C. § 1539(a)(2)(B)(ii)-(iii); 50 C.F.R. § 17.32(b)(2)(iii); Fish & Game Code § 2081(b)(2), (4).) The NSOCP in the PALCO HCP does not meet either of these criteria for issuance of an ITP under the ESA and CESA.[1]

The HCP Handbook states that a finding of adequate mitigation requires USFWS to consider two basic factors: (1) adequacy of the HCP's mitigation program; and (2) whether it is the maximum that can practically be implemented by the applicant. (HCP Handbook, p. 7-3.) With respect to the first factor, the comments of Armand Gonzalez, Alan Franklin, Peter Carlson and Joyce Kadoch, and in sections I.A.1.b and V of this letter, point out numerous deficiencies in the NSOCP mitigation program in the HCP. (*See* Exhibits 1-3, 15.)

With respect to the second factor, the HCP contains no discussion of whether the proposed mitigation program is the maximum that PALCO can practically implement. The HCP Handbook states that:

> particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can reasonably be required by that applicant. This may require weighing the costs of implementing additional mitigation, [the] benefits . . . of implementing additional mitigation, the amount of mitigation provided by other applicants in similar situations, and the abilities of that particular applicant. (HCP Handbook, p. 7-3.)

The expert comments clearly indicate that the adequacy of the NSOCP is at best "a close

[1] Although the NSO is not listed under CESA, the criteria of that statute are discussed herein because the NSO is a covered species under the HCP for purposes of both state and federal law. *See* discussion in section IV of this letter for reasons why coverage of unlisted species in an ITP is illegal under CESA.

call." However, the HCP contains no justification for why this low level of mitigation is being proposed: there is no discussion of relative benefits and costs, mitigation programs in other HCPs, PALCO's financial condition, etc. In fact, there *is* no justification, since, as Peter Carlson and Alan Franklin observe, STCO has implemented a NSO mitigation program in its HCP that, though far from ideal, meets significantly higher standards than PALCO's NSOCP. ELF-5 con.

Furthermore, other approved and pending NSO HCPs are likewise meeting higher standards. (*See e.g.* Exhibit 15, Memorandum to Phil Detrich from Dennis Mackey, Apr. 4, 1997, re NSO Activity Center and Nest Site Protections in Washington and Oregon HCPs (70 acre or more protection for NSO nest sites in other approved and pending HCPs); Exhibit 8, proposed NSO 4(d) rule.) It is more than feasible for PALCO to implement a program that meets standards that are as high or higher than these other HCPs, particularly given that PALCO will receive nearly $500 million from the state and federal governments for the Headwaters Forest acquisition.

As to the adequacy of funding, the HCP contains no discussion of how the NSOCP will be funded. In fact, the IA implies that PALCO will not necessarily ensure funding, directly contrary to the section 10(a) and section 2081 ITP issuance criteria. (*See* HCP Vol. VI, IA section 3.3.)

In light of this, it would clearly be arbitrary and capricious for USFWS and CDFG to issue an ITP for NSO to PALCO.

b. <u>The HCP will appreciably reduce the likelihood of the NSO's survival and recovery in the wild</u>

Section 10(a)(2)(B) of the ESA and section 2081(c) of CESA also prohibit the USFWS from issuing an ITP if the amount or extent of the proposed taking will "appreciably reduce the likelihood of the survival and recovery of the species in the wild." (*See* 16 U.S.C. § 1539(a)(2)(B)(iv); 50 C.F.R. § 17.32(b)(2)(iv); Fish & Game Code § 2081(c).) This is the equivalent of the jeopardy standard under section 7(a)(2) (see below). (*See, e.g.*, House Rep. No. 97-567, p. 31; House Conf. Rep. No. 97-835, p. 29; 50 C.F.R. § 402.02.) ELF-6

In order to determine whether the proposed level of incidental take will cause jeopardy to the species, the amount of take must be "viewed against the aggregate effects of everything that has led to the species' current status," and "those things likely to affect the species in the future." (USFWS and NMFS Endangered Species Consultation Handbook, March 1998, p. 4-35 (hereafter "Consultation Handbook").) To make a jeopardy determination, the USFWS and NMFS must first determine the status of the species in question, and evaluate the environmental baseline, all effects of the proposed action, and the cumulative effects of other anticipated actions.

ELF-6 con.

(*Id.*) The final analysis then examines whether, "given the aggregate effects, the species can be expected to both survive and recover."[2] (*Id.*)

If the USFWS objectively evaluates the status of NSO and the existing environmental baseline and cumulative effects, it necessarily must conclude that this species is in serious trouble. The NSO is currently experiencing astonishing levels of take throughout the Pacific Northwest on public and private lands. This take has occurred and will continue to occur through implementation of the Northwest Forest Plan; the "salvage logging rider," section 2001 of P.L. 104-19, 109 Stat. 194; numerous HCPs covering millions of acres throughout the Northwest; and the proposed section 4(d) rule authorizing incidental take of the owl. (60 Fed. Reg. 9484 (Feb. 17, 1995).) The owl cannot possibly sustain this level of take and be expected to survive, let alone recover.

Indeed, the final draft recovery plan for the northern spotted owl concluded even in 1992 that:

(1) the population of northern spotted owls across their range was in decline and the rate of decline was accelerating; and

(2) there was a linearly declining survival probability of adult females.

(Exhibit 7, Final Draft NSO Recovery Plan, 1992.) Likewise, in 1994, several preeminent owl population biologists concluded that the rate of population decline was 4.5% per year *across* the owl's range, and that the rate of decline was continuing to accelerate at a rate of 1% per year. (Lande, et al., 1994, referenced in Jasper Carlton letter to USFWS, Exhibit 15.)

Since that time, however, the owl's biological circumstances have become significantly *worse*, not better. At least fifteen HCPs covering several million acres, including high quality spotted owl habitat, have been approved, are awaiting approval, or are currently being drafted throughout the Pacific Northwest, including California. These HCPs authorize or contemplate

---

[2] The Consultation Handbook defines "recovery" as "improvement in the status of a listed species to the point at which listing is no longer necessary," and "the process by which species' ecosystems are restored and/or threats to the species removed so self-sustaining and self-regulating populations of listed species can be supported as persistent members of native biotic communities."

The Handbook defines "survival" as "the species' persistence . . . beyond the conditions leading to its endangerment, with sufficient resilience to allow recovery from endangerment" and "the condition in which a species continues to exist while retaining the potential for recovery."

unsustainable levels of take of *hundreds* of spotted owl pairs. (*See* submission of Brian Gaffney (EPIC and Sierra Club) and Daniel Hall (American Lands Alliance) and Exhibit 13.) The Plum Creek HCP in Washington State, for example, allows two-thirds of the spotted owl home sites on Plum Creek property to be harvested over the next twenty years, and the remaining one third to be harvested thereafter.

ELF-6 con.

In addition, numerous green tree and salvage timber sales have been authorized on public lands throughout the Pacific Northwest under the salvage logging rider. These timbers sales have been executed without even the most basic environmental safeguards, and have resulted in clearcutting and other harvesting of owl nesting, roosting and foraging (NRF) habitat. Because salvage rider timber sales have not undergone any detailed environmental review, it is not even known how many spotted owl pairs have been adversely affected by these activities. This has prompted a comprehensive review of the status of NSO populations across their range; which is expected to be completed at the end of this year. (Exhibit 15.)

Thus, the status of the NSO population and existing environmental baseline for purposes of applying the jeopardy standard is bleak. When the effects of the PALCO HCP are added to this disastrous baseline, the USFWS must conclude that the plan will cause jeopardy.

Although the jeopardy analysis is usually applied to the entire species, there is an exception to this policy for wide ranging species or those with "disjunct or fragmented populations," like the NSO. (Consultation Handbook, p. 4-36.) For these species, applying the jeopardy standard on a species-wide basis "can result in significant accumulated losses of habitat and population[s] that may, in total result in a jeopardy situation." (*Id.*) In such cases, the jeopardy analysis may be applied to individual recovery units which are documented "as necessary to both the survival and recovery of the species" in a recovery plan. (*Id.*) When an action "appreciably impairs or precludes the capability of a recover unit from providing both the survival and recovery function assigned to it, that action may represent jeopardy to the species." (*Id.*)

The final draft of the NSO recovery plan identifies eleven physiographic provinces across the range of the NSO, and includes recovery objectives specific to the needs of NSO populations in each province. The province encompassing the PALCO HCP area is the California Coastal Province. Thus, the jeopardy analysis must analyze the impact of the HCP on NSO populations in this province. The California Coastal Province is important to the overall survival and recovery of the NSO in California: over one third of California's owl population resides in this area. There are very few acres of federal land in this region, emphasizing the need for strong protection of the owl on non-federal lands. (60 Fed. Reg. 9494, Exhibit 8.)

Both Peter Carlson and Joyce Kadoch opine that the PALCO HCP is likely to jeopardize

the California Coastal population of NSO, particularly given that the HCP is likely to set a precedent for other NSO HCPs in California. (Exhibits 2, 3.) Carlson states that the NSO population on PALCO lands constitutes a significant portion of the population in the California Coastal Province, and that the substantial reduction in such populations under the PALCO HCP will constitute a potential jeopardy situation. Kadoch likewise states that reduction in 50% of high quality nesting habitat, 85% of medium quality nesting habitat and 50% of the foraging habitat on PALCO lands during the first 20 years of the plan will jeopardize the owl. ELF-6 con.

Therefore, the USFWS and CDFG cannot issue an ITP to PALCO based on the NSOCP.

c. The HCP contains inadequate monitoring and reporting requirements

Section 10(a)(2)(B) of the ESA and its implementing regulations require an ITP to contain monitoring and reporting requirements necessary for determining whether permit terms and conditions are being complied with. (16 U.S.C. § 1539(2)(B); 50 C.F.R. § 17.32(b)(3).) Section 2081(b) of CESA requires ITPs to include provisions for monitoring both compliance with and the effectiveness of the plan's mitigation measures. (Fish and Game Code § 2081(b).) ELF-7

Monitoring programs must be as specific as possible and be commensurate with the project's scope and effects. (HCP Handbook, p. 3-26.) Such programs must include periodic accountings of take, surveys to determine species status, and progress reports on fulfillment of mitigation requirements. Finally, monitoring programs must establish target milestones or requirements and adaptive management options. (*Id.*)

The HCP must also include "reporting requirements necessary to track take levels occurring under the program and to ensure the conservation program is being properly implemented." (HCP Handbook, p. 6-25.)

The PALCO HCP includes no compliance monitoring, and, instead of comprehensive effectiveness monitoring meeting the above standards, the HCP proposes survey only a "sample area" after the first five years of plan implementation and compare these results to the estimated baseline. The HCP does not even describe how this "sample area" will be chosen. Alan Franklin and Peter Carlson state that the proposed monitoring method is not well designed or statistically valid. (Exhibits 1 and 2.) Survey methods proposed to be used to determine, monitor and adjust the baseline are also flawed and inadequate. (*See* comments of Joyce Kadoch and Armand Gonzalez, Exhibits 2 and 15.)

B. The USFWS' Issuance of an ITP to PALCO Based on the Proposed HCP Will Violate Section 7 of the ESA ELF-8

Section 7(a)(2) requires all federal agencies to insure that any action they authorize, fund or otherwise carry out is not likely to: (1) jeopardize the continued existence of *any* listed species (including plant species); or (2) adversely modify or destroy designated critical habitat. (16 U.S.C. § 1536(a)(2).) To "jeopardize the continued existence of" means to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that species." (50 C.F.R. § 402.02.) This definition mirrors the analogous section 10(a) ITP issuance criterion. (Because the critical habitat designation for NSO does not include any private lands, only the jeopardy standard is analyzed herein.)

ELF-8 con.

In order to ensure compliance with the mandatory duty to ensure no jeopardy to listed species, section 7(a)(2) requires each federal agency to engage in formal consultation with the Secretary of the Interior and/or the Secretary of Commerce on any proposed agency action that *may* adversely affect a listed species. Issuance of an ITP by USFWS and the NMFS is an "agency action" that may adversely affect listed species, and is therefore subject to formal section 7 consultation. (Ramsey v. Kantor, __ F.3d __ (9th Cir. 1996); HCP Handbook, p. 1-6.)

During the consultation process, the USFWS and NMFS must, among other things: (1) review all relevant information concerning the listed species; (2) evaluate the current status of the species; and (3) analyze the direct, indirect and cumulative effects of the action on the species. (50 C.F.R. § 402.14(g).) Within 45 days after the conclusion of formal consultation, the USFWS must prepare a biological opinion as to whether the action will jeopardize the species. (16 U.S.C. § 1536(b)(3)(A).) The biological opinion must be based on the best available scientific information, and describe how the proposed agency action will affect the listed species, including an analysis of direct, indirect and cumulative effects. (16 U.S.C. § 1536(a)(2), (b).) If the USFWS issues a jeopardy opinion, it must include reasonable and prudent alternatives that would avoid jeopardy. (16 U.S.C. § 1536(b)(3)(A).)

1. The USFWS cannot issue an ITP to PALCO without determining its effect on listed plants

The HCP Handbook states that, though the section 9 take prohibition does not apply to listed plants, HCPs nevertheless should include listed plants in order to avoid a jeopardy determination under section 7 (which does apply to listed plant species). (Handbook, p. 3-8, 3-17.) The PALCO HCP, however, does not address listed plant species in any way. It is therefore impossible to determine whether implementation of the HCP and issuance of the ITP will jeopardize these species.

ELF-9

2. Issuance of an ITP to PALCO based on the HCP will jeopardize the NSO

ELF-10

In addition, will violate section 7 with respect to NSO. The HCP will jeopardize the continued existence of the NSO, for the same reasons it will "appreciably reduce the likelihood of the species' survival and recovery" under section 10(a). (*See* comments in section I.A.2.b.) ELF-10

3. The HCP will have significant cumulative impacts on NSO

The USFWS' section 7 jeopardy analysis must account for the numerous past, present and reasonably foreseeable cumulative impacts on the NSO across its range. By authorizing take of more than one third of the existing baseline of NSO pairs on PALCO land, the HCP will contribute to these cumulative effects. *See* comments of NSO experts and Richard Grassetti and Brian Gaffney on behalf of EPIC and the Sierra Club, Exhibits 1-3, 5, 15.) ELF-11

4. Because the HCP is not based on the best available science, the USFWS cannot issue the ITP consistent with section 7

As pointed out in the comments of NSO experts Armand Gonzalez, Alan Franklin, Peter Carlson and Joyce Kadoch, the HCP is not based on the best available science. (Exhibits 1-3, 15.) Therefore, unless the USFWS conducts an independent analysis of the data, assumptions and conclusions in the HCP, and alters these accordingly to be consistent with the best available information, the USFWS cannot issue the ITP consistent with section 7. ELF-12

II. HCP Vol. IV, Part G: Alternatives Considered

ESA Section 10(a)(2)(A)(iii) requires the HCP to include a description of "what alternative actions to [the] taking the applicant considered and the reasons why such alternatives are not being utilized." (16 U.S.C. § 1539(a)(2)(A)(iii).) The alternatives discussion in the HCP is inadequate for the reasons described below. ELF-13

The HCP's description of Alternative 1 (the "no take" alternative) is misleading in that it implies the proposed action is superior to a "no take" alternative because the HCP includes measures to improve habitat conditions. This is an incorrect characterization of the proposed action. The proposed action *by definition* is inferior to a "no take" alternative because it includes a permit authorizing PALCO to take species, i.e. to engage in activities that kill or injure species and destroy their habitat - activities that, but for the permit, would otherwise be prohibited under the federal ESA. An HCP is a required component of an application for an ITP that includes measures to minimize and *mitigate* (but not necessarily eliminate) the *impacts* of the authorized take.

This mischaracterization of the proposed action appears throughout the discussion of Alternative 1. For example, the HCP states that "all areas on PALCO's property, including old

growth redwood, would be subject to harvest in accordance with California Forest Practice Rules." This patently incorrect. The courts have held, and the USFWS has stated, that PALCO may not harvest timber in old growth redwood groves occupied by marbled murrelet without violating the take prohibition of the ESA. Thus, such activities would be prohibited under a "no take" alternative. The HCP also erroneously states that the Headwaters Reserve would not be set aside without the HCP. This is also incorrect. The purchase of the Headwaters Reserve by the federal and state governments at fair market value is a transaction entirely independent of PALCO's HCP.

ELF-13 CON.

PALCO's rationale for not selecting Alternative 1 is equally flawed. Again, the document cites the purported species preservation benefits of the HCP. However, the HCP does not even begin to mitigate for the significant adverse impacts of the ITP on species, such as significant losses of occupied and potentially occupied marbled murrelet habitat, northern spotted owl NRF sites, late seral forest, and riparian corridors that would be protected under a "no take" alternative. The document also cites the alleged "conservation benefits" of the HCP for various unlisted species. However, this statement ignores the fact that, under the HCP implementing agreement, PALCO will receive decades long regulatory assurances in exchange for minimal up front conservation commitments for such species. Under the IA, the federal and state governments will be able to seek additional mitigation measures for future adverse impacts to unlisted species, if and when they are listed, only in very limited circumstances.

Finally, PALCO asserts that it rejected Alternative 1 (as well as Alternatives 2 and 3) because these alternatives would purportedly result in "severe" economic impacts on PALCO's business. This bald conclusion is unsupported by any data or rationale. According to the HCP Handbook, assertions that an alternative is economically infeasible must be supported by data to the extent that it is reasonably available and non-proprietary. (HCP Handbook, p. 3-36.) Otherwise, the USFWS and NMFS cannot make the determination whether the impacts of the proposed action are mitigated to the maximum extent practicable. (*Id.*)

III. HCP Vol. IV, Part H: Changed and Unforeseen Circumstances

A. No Surprises Rule

See comments on HCP implementing agreement (IA), HCP Vol. VI, in section IV below, for a complete discussion of legal problems with the no surprises regulation as applied to the PALCO HCP.

B. Fire, Wind, Flood, Landslide and Earthquake Changed Circumstances

ELF-14

1. Introduction

The introduction to this section concludes, without basis, that "[m]ore likely than not species will continue to survive with populations of sufficient size, distribution, and connectivity to successfully avoid concerns for genetic isolation and stochastic demographic events." (HCP Vol. IV, Part H, p. 3.) There is, however, absolutely no scientific or other evidentiary basis for this conclusion. This conclusion also fails to account for the possibility of significant cumulative effects on the species from activities on other non-federal, state and federal lands across the species' range. The HCP inappropriately relies on this bald, unsupported assertion of future survival as justification for the HCP's failure to include significant new mitigation requirements to address future changed circumstances.

ELF-14 CON.

Furthermore, even assuming the accuracy of the HCP's conclusion that species covered by the HCP will continue to survive into the future, this is irrelevant for purposes of a changed circumstances analysis. The focus of the changed circumstances analysis is not whether the species populations *as a whole* are likely to survive in the event of changed circumstances on PALCO land. Rather, the pertinent inquiry is whether future changed circumstances on PALCO land will alter the assumptions and conclusions *in the HCP* that the impacts *of PALCO's activities*, as authorized in the ITP and SYP, on covered species will be mitigated to the maximum extent practicable and jeopardy will be avoided. A given species may still survive elsewhere in its range, yet a future natural catastrophe may adversely impact effective mitigation of the impacts of PALCO's timber harvesting activities *on PALCO lands,* as well as the species' overall survival prospects. Such a situation should require PALCO to substantively alter its timber harvest activities to mitigate the impacts of such changed circumstance, regardless of how healthy the species is elsewhere in its range, in order to meet the permit issuance criteria of section 10(a) and section 2081.

2. Fires

This section contains no relevant scientific evidence to support the document's conclusion that "it is not reasonably foreseeable that stand replacing fires will occur on PALCO's lands during the life of the conservation plan." (*Id.*, p. 5.) Studies cited that concern other areas, such as the Olympic Peninsula in Washington, are irrelevant. Further, the conclusions of studies of coastal redwood forests contradict the document's overall conclusion and suggest that fires are in fact fairly frequent events in coastal redwood forests.

There is also no support for the statement that the effects of fires of less than 500 acres are already mitigated by the HCP's existing operation program (EOP). There are no mitigation measures in the EOP which deal specifically with fire. Contrary to the HCP's statement, the setting aside of the MMCAs and Headwaters Reserve and purported preservation of "widely distributed" late seral forests in no way addresses the issue. What happens if the habitat value of one or more of these areas is severely degraded by a fire? The HCP does not provide that

additional areas, otherwise subject to harvest under the HCP, will be set aside to compensate for this impact. ELF-14 con.

The HCP does include *a watershed analysis process* for dealing with fires between 500 and 2,500 acres in any one hydrologic unit "which result in consumption of the understory vegetation in the RMZs of the Class I or Class II streams." However, the substantive outcome of this process is entirely unclear. The HCP simply states that the outcome of the watershed analyses "will be the development of appropriate measures" to minimize the negative effects of the fire on *aquatic species*. The HCP does not define what "appropriate measures" are, nor does it require such measures to address non-aquatic species, such as NSO. This is particularly important given that the HCP appears to assume that the RMZs will contribute all or most of the late seral NRF habitat for NSO. It also unclear whether *PALCO* or some other entity will be required to implement the measures developed through the further watershed analysis.

Further, the HCP does not address wildfires along Class III streams, or fires between 500 and 2,500 acres which originate in areas outside the RMZs at all, thus unlawfully shifting this responsibility to the public under the no surprises rule.

Finally, the determination that fires of more than 2,500 acres are "unforeseen" is arbitrary and without scientific or evidentiary support.

3. Windthrow

This section fails to address the edge effects of windthrow on marbled murrelet nesting and roosting habitat. ELF-15

Again, as with the discussion of fire changed circumstances, the HCP fails to address windstorms which result in less than 200 feet of blowdown, and inexplicably does not include additional mitigation for windthrow between 200 and 500 feet on species other than aquatic species, or windthrow on Class III streams. Future mitigation measures for windthrow effects between 200 and 500 feet on aquatic species are not specified, thus making it impossible to determine whether such impacts will be adequately mitigated.

Finally, the determination that wind storms that result in more than 500 feet of complete blowdown along the edge of a Class I or Class II stream is an "unforeseen circumstance" is arbitrary and without scientific or evidentiary support.

4. Landslides

This section does not address landslides which cause significant alteration of less than ELF-16

10% of the total length of a Class I or Class II stream. Nor does it address landslides (of any magnitude) which affect Class III streams. The document provides no explanation of how the magnitude of landslides will be determined and who will be responsible for making this determination. ELF-16 con.

In addition, the mitigation for landslides which affect between 10 and 50% of the length of a Class I or Class II stream suffers from the same problems as that for fire and windthrow changed circumstances.

5. Floods

This section states that floods less than a 50 year magnitude will be mitigated by the HCP's watershed assessment process. However, since the watershed management prescriptions have yet to be developed through that process, it is impossible for the HCP to so conclude. In fact, given the extensive damage to riparian habitat that has occurred on PALCO lands in even just the last few years (such as in the Bear Creek watershed), it is unlikely that impacts of less than 50 year floods will be adequately mitigated by the watershed prescriptions. ELF-17

With respect to 50-100 year floods, since the future mitigation measures to be employed are also not specified, it is likewise impossible to determine whether the impacts of such future floods will be adequately mitigated.

Finally, there is no stated scientific basis for labelling greater than 100 year floods as "unforeseen circumstances."

6. Oil spills and El Nino events

The HCP concludes that oil spills "of sufficient magnitude to cause so significant adverse impacts [so as] . . . to require additional conservation or mitigation measures" are "unforeseen circumstances." This is patently absurd and without any scientific or common sense support. Indeed, the HCP itself acknowledges an oil spill as recently as November of 1997 which killed at least 11 marbled murrelets. However, incredibly, the document goes on to conclude that such spill was insignificant because it supposedly increased the available reproductive habitat for the remaining breeding birds. This conclusion flies in the face of all reasonable scientific evidence concerning the impact of oil spills on the marbled murrelet population and reproductive success. ELF-18

The HCP also concludes, without basis, that an El Nino event greater than 1997-98 is unforeseeable, and that the HCP contains "all mitigation necessary" to respond to such an event simply because the plan was developed during an El Nino event! However, in actuality, El Nino events are becoming more severe as global warming increases and thus more severe events are

entirely foreseeable. Furthermore, the HCP contains no specific mitigation measures to deal with effects on reproduction and distribution of covered species due to an El Nino event, and no such measures are described in this section. ELF-18 con.

C. Legal Changed and Unforeseen Circumstances

1. Listing of uncovered species

This section implies that, if a species not covered by the HCP is listed in the plan area in the future, PALCO need not necessarily modify its activities under the HCP. This is incorrect. If a new species is listed for which PALCO has not previously obtained an ITP,[3] PALCO is prohibited from taking that species under section 9 of the ESA. This may indeed require PALCO to modify it timber harvest activities under the HCP, at least until such time as it obtains an ITP for such species. ELF-19

Furthermore, there is no legal basis for limiting the mitigation measures in such future ITP to those specified in the current HCP, or for requiring "no take/no jeopardy" measures to be developed "in consultation with PALCO." The USFWS, NMFS and CDFG must make a comprehensive and independent assessment, based on the best scientific evidence *available at that time,* of measures necessary to avoid take of, minimize and mitigate impacts to, and avoid jeopardy to, the newly listed species, as appropriate.

2. Permit suspension and revocation

The procedures identified in this section are contrary to 50 C.F.R. §§ 13.27 and 13.28. The wildlife agencies cannot legally be required to obtain PALCO's consent to "no take/no jeopardy measures," if the permit is suspended or revoked, nor can they be required to submit to an alternative dispute resolution process. The agencies have legal authority to suspend or revoke the permit if the permittee is not in compliance with permit conditions or with applicable laws and regulations governing the permitted activity, or populations of species covered by the permit "decline to an extent that continuation of the permitted activity would be detrimental to the maintenance or recovery of the affected population." (50 C.F.R. § 13.28(a)(5).) Once suspended or revoked, the section 9 take prohibition goes into effect and automatically applies to PALCO. No further action by the wildlife agencies is required. ELF-20

[3] This discussion assumes, but does not concede, the propriety of issuing ITPs for unlisted species, as proposed in the PALCO HCP IA. See section IV below for a discussion of the legality of issuing an ITP for unlisted species.

Nor can the wildlife agencies legally restrict their future authority to modify PALCO's permit as necessary to protect listed species consistent with the requirements of the ESA. This is contrary to 50 C.F.R. § 13.23(b) (which allows the Services to amend a permit at any time during its term upon a finding of necessity) and sections 2, 4, 7 and 10 of the ESA. Thus, permit modifications cannot be required to "minimize impacts to the Covered Activities consistent with" the HCP and IA. ELF-20 con.

IV. HCP Vol. VI: Implementing Agreement

The following comments on the Implementing Agreement (IA) are intended to supplement comments made by Tom Lippe, Esq. and Brian Gaffney, Esq., also on behalf of Sierra Club and EPIC.

A. Recitals

Recital A states that lands covered by the HCP and IA will include certain lands that PALCO has not yet acquired, which are allegedly described in Exhibit A to the IA. However, no Exhibits are attached to the public review document. Therefore, it is impossible to ascertain what lands will be included within the HCP and IA. Therefore, the public has been denied adequate review of the HCP and IA. The IA must be recirculated for public comment with all Exhibits attached. ELF-21

Furthermore, it is inappropriate for the HCP and IA to cover lands that are not yet within PALCO's ownership. Such lands have not been surveyed or otherwise evaluated for their habitat value; nor does the HCP specifically describe how it will be applied to these lands. Thus, USFWS and NMFS cannot legitimately find that impacts of the ITP have been mitigated to the maximum extent practicable and that jeopardy has been avoided with respect to these lands.

Recital L incorrectly states that PALCO would not have agreed to the "substantial commitments" of land, natural resources, money and other property and other "substantial restrictions" on the use of Covered Lands "but for the assurances of the Agencies" provided in the HCP and IA. Under section 10(a)(2)(B) or the ESA, in order to obtain an ITP, PALCO *must* agree to mitigate the impacts of the taking to the maximum extent practicable, must ensure that there is adequate funding for such mitigation measures, and must ensure that the impacts of the taking do not jeopardize the continued existence of covered species or adversely modify or destroy designated critical habitat.

B. Section 2

Section 2 of the IA should include the required findings under section 7 of the ESA. ELF-22

USFWS, NMFS and CDFG also cannot legitimately make the finding in sections 2.1.1, 2.2.1 and 2.3.1 that the HCP satisfies the permit issuance criteria of section 10(a)(2)(B) of the ESA and Fish and Game Code § 2081 with respect to unlisted species. Section 10(a) and section 2081 permits cannot be issued until such time as the unlisted species become listed. By that time, the findings made under section 2 of the IA will almost certainly have become obsolete and superseded by new scientific information developed through the listing process, as well as new or changed circumstances. The wildlife agencies therefore cannot lawfully find, months to years in advance of a species listing, that the impacts of the HCP on that particular species have been mitigated to the maximum extent practicable and jeopardy has been avoided. Such findings are also by definition not based on the best scientific evidence available as required by section 7 of the ESA (see comments of Tom Lippe). ELF-22 CON.

For the same reasons, the IA also cannot lawfully provide for automatic issuance of a take permit when an unlisted species becomes listed. Rather, the wildlife agencies must make an independent determination, at the time the species is listed, whether to issue such a permit, and if so, under what terms and conditions.

C. Section 3

1. Section 3.1.4

Section 3.1.4 states that increases in take may be authorized by permit amendment approved pursuant to section 7.2 of the IA. It is entirely inappropriate for PALCO to receive authorization for increased take when the USFWS and NMFS have already warranted that no further mitigation is required beyond that which is provided in the HCP. ELF-23

2. Section 3.3

Section 3.3 states that the funding sources PALCO will use to fulfill its funding obligations under the plan are described in Volume 1, Part A of the HCP. However, the funding sources are not described therein. PALCO should use the $500 million it will receive from the state and federal governments for the Headwaters acquisition. This section also implies that PALCO may escape its funding obligations if there is a "material change" in PALCO's financial condition "which will adversely affect PALCO's ability to manage the covered lands in accordance with the terms of this agreement and the HCP." This provision of the IA is unauthorized by statute, which requires PALCO to *ensure* that adequate funding will be available to implement the HCP. (16 U.S.C. § 1539(a)(2)(B)(iii).) The ITP cannot be issued without such assurances. ELF-24

3. Section 3.4.2

Section 3.4.2 illegitimately authorizes PALCO to exempt from disclosure a wide variety of information that is not otherwise exempt from disclosure under the Public Records Act or Freedom of Information Act. ELF-25

D. Section 5.2

The finding the USFWS and NMFS must make in order to approve extension of the HCP to additional lands is nonsensical. Nowhere does the HCP or EIS/EIR analyze the impacts of extending the HCP and IA to specific additional lands. Therefore, it is impossible for the agencies to find that such an extension will *not* result in new impacts that were not analyzed and mitigated under the HCP. ELF-26

E. Section 6

1. Section 6.1.1

USFWS and NMFS may not legally agree to automatically issue take permits for unlisted species if they are listed. Such determinations must be made on the basis of the best available scientific information at the time the species is listed and the permit issued. ELF-27

2. Section 6.1.2

USFWS may not use a special purpose permit to authorize incidental take of bird species covered by the Migratory Bird Treaty Act (MBTA). Likewise, incidental take of bald and golden eagles may not be authorized under the Bald and Golden Eagle Protection Act (BGEPA). In fact, the USFWS has admitted that incidental take is not authorized under either of these statutes. (*See* HCP Handbook, Appendix 5.) ELF-28

Moreover, even if the special purpose permit regulations under the MBTA could be construed to authorize incidental take of migratory birds, a fundamental condition of permit issuance is that the applicant must demonstrate "a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification." (50 C.F.R. § 21.27.) Far from benefitting migratory birds, the PALCO HCP will have a detrimental effect on these creatures. Furthermore, PALCO can demonstrate no other compelling justification for issuance of a special purpose permit within the meaning of 50 C.F.R. § 21.27. Therefore, the IA may not lawfully provide for issuance of such a permit to PALCO and PALCO may not incidentally take migratory bird species under the MBTA (or BGEPA).

3. Sections 6.1.3, 6.1.4, 6.1.6

ELF-29

For the reasons described below, the "no surprises" assurances in these sections of the IA are inconsistent with the overall goals and policies of the ESA and are therefore *ultra vires.*

The assurances are contrary to the conservation goals of the ESA.

The fundamental purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend for survival. (16 U.S.C. § 1531(b).) "Conserve" is defined extremely broadly as "the use of all methods and procedures which are necessary to bring any endangered . . . and threatened species to the point at which the measures provided by [the ESA] are no longer necessary." (16 U.S.C. § 1532(3).) Thus, the ESA's primary goal is to *recover* endangered and threatened species, a goal which the law seeks to achieve above all others. As the U.S. Supreme Court stated in Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978) (recently reaffirmed in Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407 (1995)): "the plain intent of Congress was to halt and reverse the trend toward species extinction, *whatever the cost.*" Because this recovery goal is the cornerstone of the ESA, all ESA implementation actions must be construed in light of this basic objective.

The ESA's overriding conservation mandate is expressly incorporated into several substantive provisions of the act. Section 4(d), for example, requires the Services to promulgate rules that provide for the conservation of threatened species. (16 U.S.C. § 1533(d).) Section 4(f) requires the Services to prepare a recovery plan for each listed species, unless they find that such plan will not provide for the conservation of a particular species. (16 U.S.C. § 1533(f).) The Services also have a mandatory duty to conserve listed species under section 7. (16 U.S.C. § 1536(a)(1).) In Carson-Truckee Water Conservancy v. Clark, 741 F.2d 257, 262 (9th Cir. 1984), the Ninth Circuit Court of Appeals held that all federal agencies (including the Services) have an affirmative obligation to conserve threatened and endangered species under section 7(a)(1), which requires them to "actively pursue a species conservation policy." (*See also* Pyramid Lake Pauite Tribe v. U.S. Dep't of the Navy, 898 F.2d 1410, 1417 (9th Cir. 1990).)

The regulatory assurances in the IA are inconsistent with the basic conservation goals of the ESA and will necessarily preclude the Services from meeting their mandatory conservation obligations under sections 2, 4 and 7 of the act. The assurances limit both the circumstances under which the federal government may require additional mitigation measures, as well as the type of mitigation that may be required. The IA purports to foreclose the Services from seeking future conservation measure that would require PALCO to dedicate additional land or water, pay additional money or be subject to new regulatory restrictions if not provided for in the original HCP.

Instead, the federal government must pay for and implement such mitigation itself. This is true even if new information, changed circumstances not provided for in the HCP, or

unforeseen circumstances reveal that the terms, conditions, or goals of the HCP and ITP are inadequate to ensure the continued survival and recovery of any one or more species covered by the plan, and that such additional measures are necessary to conserve the species. Even minor changes in the management regime applicable to areas *already* set aside for species conservation under the original HCP can only be imposed in "unforeseen circumstances." ELF-29 con.

The response that the government will pay for any future needs of the species is no answer at all because the federal government has not guaranteed that adequate funding will be available to meet this potentially enormous obligation. In fact, the IA expressly conditions the Services' obligations to provide funding on the availability of funds. (Section 10.8.)

Thus, the assurances unlawfully appear to place all the risk of inadequacy of the PALCO HCP on the covered species and none on PALCO: the precise opposite of what the ESA requires. (*See* T.V.A. v. Hill, 437 U.S. at 185 (endangered species protection is to be afforded "the highest of priorities"); 16 U.S.C. § 1531(b) (the purpose of the ESA is to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.) By preventing the Services from imposing any meaningful additional mitigation measures on PALCO for the entire life of the permit, the policy unlawfully forecloses the Services from: (1) using "all methods and procedures necessary" to conserve species under section 2 of the ESA; (2) implementing conservation measures for threatened species under section 4(d); (3) preparing adequate recovery plans under section 4(f); and (4) fulfilling its mandatory conservation obligations under section 7(a)(1). Therefore, the policy must be rescinded or substantially revised as described in more detail below.

The assurances unlawfully allow the Services to avoid their mandatory duties under Section 7 of the ESA.

For similar reasons, the assurances provisions unlawfully may preclude the Services from satisfying their mandatory duties under section 7(a)(2) of the ESA. Section 7(a)(2) requires all federal agencies to insure that their actions are not likely to jeopardize the continued existence of a listed species or adversely modify or destroy designated critical habitat. (16 U.S.C. § 1536(a)(2).) These duties apply to the Services' issuance of an ITP, which is a federal agency action.

In order to carry out these section 7 duties, if a federal agency determines that an action "may affect" a listed species, the agency must formally consult with the Service. During formal consultation, the Service must prepare a biological opinion which "detail[s] how the agency action affects the species," and sets forth the Service's opinion as to whether the action is "likely to jeopardize" the continued existence of the species or adversely modify or destroy critical habitat. (16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g), (h).) If the Service concludes that

ELF-29 con.

an action is likely to jeopardize the species or modify critical habitat, it must include "reasonable and prudent alternatives" that would avoid jeopardy or adverse modification. (16 U.S.C. § 1536(b)(3)(A).) Pending formal consultation, the federal agency cannot make an "irreversible and irretrievable commitment of resources" that would foreclose the agency's ability to implement reasonable and prudent alternatives. (16 U.S.C. § 1536(d).)

Finally, if after the conclusion of formal consultation, (1) new information is brought to light that "may affect a listed species or critical habitat in a manner or to an extent not previously considered," (2) a new species is listed or critical habitat designated in an area that may be affected by the agency action; (3) the action is modified in a manner that causes an impact on the species that was not previously considered in the biological opinion; or (4) the amount or extent of incidental take allowed in the biological opinion is exceeded, the Services must reinitiate formal consultation. (50 C.F.R. § 402.16.) Once consultation is reinitiated, the "no irreversible and irretrievable commitment of resources" requirement of section 7(d) applies.

By severely limiting the instances in which mitigation may be imposed on an incidental take permittee and the types of mitigation that may be imposed, the assurances preclude the Services from meeting these statutory requirements. The assurances provisions arbitrarily predetermine the level of mitigation that will be provided to avoid jeopardy (or adverse modification of critical habitat) for fifty years, and appears to be designed to preclude meaningful reexamination of these mitigation commitments if they are later found to be inadequate to avoid jeopardy.

This artificial narrowing of the scope of measures to prevent jeopardy violates the requirement that the Services "*shall . . . insure* that any action authorized, funded or carried out by such agency [e.g. an ITP] is not likely to jeopardize the continued existence of any endangered species or threatened species." (16 U.S.C. § 1536(a)(2).) It also renders reinitiation of consultation a largely meaningless exercise. Further, the assurances may sanction irreversible and irretrievable commitments of resources by PALCO in violation of section 7(d), and foreclose Service options for implementing reasonable and prudent alternatives in violation of section 7(b).

Under the assurances provisions, jeopardy to listed species will be avoided in the future only if the PALCO agrees to implement new mitigation measures or the Services have the money to purchase the additional land needed to mitigate adverse impacts, both unlikely scenarios (particularly given the $250 million the federal government has already expended on the acquisition). It is particularly difficult to imagine how the Services will avoid jeopardy to species that are listed after the ITP is issued. Adequate scientific information regarding a species' biological needs is typically not collected until the species is actually proposed for listing. Without this critical information, it is extremely improbable that the Services will be able to adequately evaluate the impacts of the PALCO HCP and ITP on unlisted species and therefore

ELF-29 CON.

include mitigation measures sufficient to ensure no jeopardy to these species throughout the life of the permit.

The assurances are inconsistent with Section 10(a) of the ESA

The ESA strictly prohibits any person, including any private corporation or state or local government entity, from "taking" an endangered and threatened species. (16 U.S.C. §§ 1532(13); 1538(a)(2)(B); 50 C.F.R. § 17.31(a).) "Take" is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [a listed species], or to attempt to engage in any such conduct." (16 U.S.C. § 1532(19).) "Harm" in turn is defined by a USFWS regulation to proscribe habitat destruction or modification that kills or injures listed species. (50 C.F.R. § 17.3.) Injury can occur through habitat modifications that impair a species' essential behavioral patterns, including breeding, feeding and sheltering. (*Id.*)

In light of the potentially sweeping effect of the section 9 take prohibition, in 1982 Congress enacted a limited exception to this provision in order to enable certain private, state and local government activities to proceed without running afoul of this provision. (16 U.S.C. § 1539(a)(1).) However, Congress intended that, in exchange for the privilege of being granted a permit to take listed species, permit applicants would mitigate the adverse impacts to species by providing long term conservation commitments. The House Conference Report for the 1982 amendments to the ESA states:

> The Secretary, in determining whether to issue a long-term permit to carry out a conservation plan should consider the extent to which the conservation plan is likely to *enhance* the habitat of the listed species or *increase* the long-term survivability of the species or its ecosystem.

(H.R. Rep. No. 835, 97th Cong., 2d Sess., p. 31 (1982).)

The statutory conditions for approval of an incidental take permit reflect this congressional intent and require the Services to find that:

(1) the *applicant* will minimize and mitigate the impacts of the taking to the maximum extent practicable;

(2) the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild (this is the section 10(a) equivalent of the section 7 jeopardy standard); and

(3) the *applicant* will *ensure* that adequate funding for the plan will be provided.

(16 U.S.C. § 1539(a)(2)(B).)

ELF-29 CON.

By locking in potentially inadequate mitigation measures in the PALCO HCP and ITP for fifty years, and alleviating PALCO of any future mitigation responsibilities without any dedicated funding source to deal with plan failures, the assurances in the IA preclude the Services from legitimately making these findings. In particular, the assurances provisions prevent the Services from ensuring that the HCP will fully mitigate all impacts to, will not jeopardize the continued existence of covered species, and will provide adequate funding for the mitigation measures, as required under section 10(a)(2)(B). The policy also unlawfully shifts the burden of minimizing and mitigating adverse impacts to species and providing adequate funding for the plan from PALCO to the Services, contrary to the plain language of section 10(a)(2)(B). Further, the assurances inappropriately allows currently unlisted species to receive take authorizations if and when they become listed in the future, even though insufficient information may exist regarding these species for them to be treated as if they were listed under the ESA.

Finally, the assurances unlawfully shift the burden of addressing unforeseen circumstances from PALCO to the Services, contrary to the ESA and its implementing regulations. USFWS regulations require HCPs to include procedures to deal with unforeseen circumstances. (50 C.F.R. §§ 17.22(b)(1), 17.32(b)(1).) The regulations likewise require such procedures to be implemented by the permittee as a condition of permit approval. (50 C.F.R. §§ 17.22(b)(2), 17.32(b)(2).) The general permit regulations allow the Services to amend a permit at any time, upon a finding of necessity. (50 C.F.R. § 13.23(b).)

In addition, the legislative history of section 10(a) reflects the fact that, while Congress was concerned with providing regulatory certainty to permit applicants through use of *long term* (but not ironclad) ITPs, it also recognized that HCPs would have to be amended from time to time to accommodate changed and unforeseen circumstances. (*See* H.R. Rep. No. 835, 97th Cong., 2d Sess., p. 32 (1982).)

In derogation of this congressional intent, the assurances provisions in the IA allow PALCO to "deal with" unforeseen circumstances by requiring the federal government alone to address them. This is clearly not what Congress intended when it enacted section 10(a). Rather, Congress intended that, in exchange for the benefit of a long term ITP, the permit *applicant* would anticipate unforeseen circumstances and include substantive provisions in an HCP, or the HCP would be amended, to accommodate future unforeseen circumstances. Without the ability to substantively alter an HCP's mitigation program or otherwise amend the terms and conditions of an HCP and ITP to address unforeseen circumstances and new information, any purported "adaptive management" program will be essentially meaningless and will fail to provide adequate species protection.

The IA, however, severely constrains the Service's ability to address new information and changed or unforeseen circumstances. Assuming the Services are able to meet their burden of showing that "unforeseen circumstances" exist (e.g. circumstances that result in a substantial and adverse change in the status of one or more of the covered species - IA Definitions), changes to the HCP's mitigation program must be limited to alteration of management regimes for lands already set aside for species conservation. However, since an unforeseen circumstance by definition will result in a species decline, it is highly unlikely that such minor tinkering will prevent further declines. Further, this approach sanctions reallocation of finite resources and funds dedicated under the HCP at the expense of other covered species dependent upon these same scarce resources. ELF-29 CON.

Consistent with the "no surprises" rule, the IA does provide that PALCO will address certain "changed circumstances in accordance with the terms of the HCP. The fundamental problem, however, is that PALCO is not required to address all changed circumstances. As pointed out in section III.B above, PALCO has arbitrarily excluded certain changed circumstances from the HCP, or has arbitrarily categorized certain future effects as "unforeseen circumstances," thereby shifting the burden to the public to mitigate for that future change.

4. Section 6.2.1

See comments on illegality of automatic issuance of take permits for unlisted species. ELF-30

5. Section 6.2.2

This provision unlawfully restricts CDFG's ability to require future mitigation for uncovered species by requiring mitigation for take permits issued for such species to "minimize to the greatest extent possible adverse impacts of the listing or candidacy . . . on the Covered Activities." This is inconsistent with the ITP issuance criteria in Fish and Game Code § 2081(b) and (c). ELF-31

6. Sections 6.2.3, 6.2.4 and 6.2.7

The "regulatory assurances" provided in these sections, which parallel the federal "no surprises" assurances, are contrary to CESA and *ultra vires*. CESA requires all state agencies (including CDFG) to "conserve, protect, restore and enhance" (CPRE) state listed species when undertaking any state action, such as issuance of a permit. (Cal. Fish & Game Code §§ 2052, 2055.) By severely limiting PALCO's responsibilities to implement additional species conservation and management actions that may be necessary to CPRE threatened and endangered species in the future, while at the same time failing to provide an adequate, dedicated state funding source for such future actions, the IA unlawfully prevents CDFG from fully carrying out ELF-32

its CPRE duties under CESA.

For the same reason, the assurances unlawfully prevent CDFG from ensuring that its issuance of the ITP to PALCO will fully mitigate all adverse impacts to, and will not jeopardize the continued existence of, listed species, as required by CESA's ITP and state agency consultation provisions. (Cal. Fish & Game Code §§ 2081(b), (c), 2090.) If it subsequently becomes apparent that the impacts of the taking of a listed species have not in fact been minimized and fully mitigated, CDFG is legally obligated under CESA to amend, suspend, revoke, or modify the permit to remedy the situation. ELF-32 CON.

The assurances provisions of the IA likewise violate CDFG's statutory public trust responsibilities to protect all of the state's fish and wildlife resources. (*See, e.g.*, Cal. Fish & Game Code § 711.7 ("[t]he fish and wildlife resources are held in trust for the people of the state by and through the [CDFG]"); § 1802 (as trustee for fish and wildlife resources, the CDFG has "jurisdiction over the conservation, protection, and management of fish, wildlife, and native plants, and habitat necessary for biologically sustainable populations of those species").)

Finally, these assurances also violates CDFG's parallel common law public trust responsibility to protect fish and wildlife resources for the benefit of all people in the state. (*See, e.g.*, Ex Parte Maier, 103 Cal. 476, 483 (1894) ("[t]he wild game within [the] state belongs to the people in their collective, sovereign capacity" and "is not the subject of private ownership"); People v. Harbor Hut Rest., 148 Cal. App. 3d 1151, 1154 (1983) ("[i]t is beyond dispute that the State of California holds title to its . . . wildlife in public trust for the benefit of the people"); Arroyo v. State, 40 Cal. Rptr. 2d 627, 630-31 (1995) ("California courts deem wild animals to be owned by the people of the state"); Betchart v. California State Dept. of Fish and Game, 158 Cal. App. 3d 1104, 1106 (1984) (in maintaining this public trust, "[t]he state has the duty to preserve and protect wildlife").)

7. Sections 6.2.5 and 6.2.6

The findings in these sections that the HCP will not likely result in take of fully protected species or birds of prey and their nests and eggs are a patent abuse of discretion and entirely without evidentiary support. The HCP and ITP will result in substantial take of northern spotted owls, marbled murrelet and coho, including over 1/3 reduction in the existing baseline of NSO, and significant losses of residual old growth and late seral forests. There is no conceivable way that this major loss of habitat will not result in direct and indirect take of fully protected bird, mammal, fish, reptile and amphibian species and birds of prey, in direct violation of Fish and Game Code §§ 3503, 3503.5, 3505, 3511, 4700, 5050, and 5515. ELF-33

CDFG also cannot lawfully limit its ability to comply with any future law authorizing

incidental take of fully protected species by requiring the terms and conditions of such future permit to be consistent with the HCP (section 6.2.5(c)). If and when a law authorizing take of protected species is enacted, CDFG may only authorize take consistent with that statute. ELF-33 CON.

8. Section 6.2.8

The NCCP Act does not authorize issuance of take permits independent of CESA. (*See* Fish and Game Code §§ 2825(c), 2835; San Bernadino Valley Audubon Society v. Metropolitan Water District, Riverside Sup. Ct. Case No. 274844 ("the NCCP Act does not provide independent authorization for incidental 'take' for development purposes, but instead refers back to CESA and to section 2081 [of the Fish & Game Code]").) ELF-34

Even if the NCCP Act could lawfully be construed to contain independent authority for incidental take, the PALCO HCP does not qualify as an NCCP in any event. The plan does not meet the criteria for NCCPs in Fish and Game Code § 2800 *et seq.* and the NCCP General Process Guidelines, adopted by CDFG in January 1998.

In addition, neither the NCCP Act nor CESA provide authority for "habitat based" coverage (take) of species. Take is only authorized on a species by species basis. Prior to issuing a take permit, CDFG must make the findings required by section 2081(b) and (c) with respect to each species authorized to be taken.

Finally, the provision requiring CDFG to consider the information provided by PALCO when CDFG in evaluating whether to recommend listing a "habitat coverage species" under CESA is invalid. The PALCO HCP is not the kind of "management effort" that is relevant to a listing determination under CESA. (Fish & Game Code § 2072.3.) The HCP is not a conservation or recovery plan, but a mitigation plan designed to minimize the adverse effects of a substantial amount of proposed incidental take. It in no way can vitiate or avoid the need for future listings.

9. Section 6.3

This section purports to provide some degree of regulatory assurances for numerous other federal and state statutes. There is no statutory basis for such assurances, which are contrary to both the letter and intent of these laws. ELF-35

Section 6.3 (and sections 6.1 and 6.2) may unlawfully restrict the federal and state governments' future exercise of their regulatory powers. The U.S. Supreme Court has repeatedly held that state agencies cannot contract away their police powers. (*See, e.g.*, Stone v. Mississippi, 101 U.S. 814, 819 (1879); Atlantic Coast R.R. Line v. City of Goldsboro, 232 U.S. 548, 554-562

(1914); U.S. Trust Co. v. New Jersey, 431 U.S. 1, 24-25 (1977).) The same rationale prohibits federal agencies from contracting away their regulatory and public trust authorities, unless expressly authorized to do so by Congress. (*See, e.g.*, Lynch v. United States, 292 U.S. 571, 579 (1934); Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 52 (1986); *cf.* Home Tel. & Tel Co. v. City of Los Angeles, 211 U.S. 265, 273 (1908).) ELF-37 CON.

F. Section 7

These provisions are contrary to 50 C.F.R. § 13.23(b). ELF-38

G. Section 8

1. Section 8.2

This section appears to be inconsistent with 50 C.F.R. §§ 13.27 and 13.28. ELF-39

2. Section 8.5

The Services do not have the authority to agree by contract to waive future mitigation requirements (see comments on Section 6.1). In addition, this section is contrary to section 9 of the ESA. Once PALCO's permit is relinquished, suspended or revoked, the take prohibition once again goes into effect. The IA cannot simply ignore this statutory requirement. ELF-40

V. EIS/EIR, Section 3.10: Affected Environment and Environmental Effects - Northern Spotted Owl

A. Applicable Legal Standards for Impact Analysis and Mitigation Under NEPA and CEQA ELF-41

NEPA regulations require an EIS to "provide a full and fair discussion of significant environmental impacts." (40 C.F.R. § 1502.1.) NEPA regulations require an EIS to include a discussion of direct, indirect and cumulative impacts of the project and mitigation measures for any significant effects identified. (40 C.F.R. § 1502.16(a), (b), (h); 1502.14(f).) "Direct effects" are those which are immediately caused by the action. "Indirect effects" are those which will be caused by the action at a later time, but which are nevertheless reasonably foreseeable. (40 C.F.R. § 1508.8.) They include growth inducing effects and other effects related changes in land use patterns. (40 C.F.R. § 1508.8(b).) "Cumulative impacts" are defined in the NEPA regulations as the impact on the environment that results from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions." (40 C.F.R. §

ELF-41

1508.7.) A federal agency cannot ignore significant impacts by considering the environmental effects of individual projects in isolation from past and reasonably foreseeable future projects. (Inland Empire Public Lands Council, 992 F.2d at 981 (9th Cir.).)

The discussion of impacts must also include an analysis of possible conflict between the proposed action and federal, state, regional and local land use plans and policies. (40 C.F.R. § 1502.16(c).) Finally, NEPA requires an EIS to include measures to avoid or minimize *each* significant impact identified, including the impacts of alternatives. (40 C.F.R. § 1502.16(h), 1502.14(f), 1508.25.)

The analysis of environmental impacts must satisfy a "rule of reason" which requires a "reasonably thorough" discussion of impacts and mitigation measures. (Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989).) The HCP Handbook emphasizes that, unlike the impact analysis in the HCP itself, the impact analysis in an EIS must evaluate *all* significant effects on the environment, such as air quality, water quality, cultural resources, and land use patterns, not just impacts to species. (HCP Handbook p. 1-6.)

Like NEPA, CEQA requires an EIR to clearly identify and describe the direct and indirect environmental effects[4] of the project, considering both short term and long term effects. The discussion must include:

> the relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution [and] concentration, human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resources base such as water, scenic quality, and public services.

(14 Cal. Code Regs. § 15126.2(a).)

An EIR also must analyze the cumulative impacts of the project under consideration when added to other closely related past, present and reasonably foreseeable future projects. (14 Cal. Code Regs. § 15130.) "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other

---

[4] A significant environmental effect is defined as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects historic or aesthetic significance." (14 Cal. Code Regs. § 15382; *see also* Cal. Pub. Res. Code § 21068.)

environmental impacts." (14 Cal. Code Regs. § 15355.) Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time." (*Id.*)

ELF-41 con.

Finally, CEQA also requires an EIR to include measures to avoid or minimize *each* significant impact identified, including the impacts of alternatives. (14 Cal. Code Regs. § 15126.4(a).) The discussion must distinguish between measures proposed by the project proponent and those proposed by lead, responsible and trustee agencies. Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure identified. If a mitigation measure would cause one or more significant impacts in addition to those of the proposed project, these impacts must be discussed as well. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. (*Id.*)

B. Application of Legal Standards to EIS/EIR for PALCO HCP/SYP

ELF-42

The EIS/EIR for the PALCO HCP/SYP fails to meet the above legal standards. The document contains numerous unsupported assumptions and conclusions. For example, the document states that concerns regarding declines in NSO populations have largely been alleviated in recent years through implementation of the Northwest Forest Plan on public lands and the Forest Practice Rules on private lands. This is simply untrue, and is not supported by current scientific evidence.

The EIS/EIR also states that NSO declines on STCO lands are primarily due to "bad weather." This, too is unsupported by the scientific evidence; excessive timber harvesting is an equally plausible explanation for the decline. (*See* comments of Alan Franklin on USFWS' "Best Available Scientific Information on NSO in California Coastal Region," Apr. 1997, Exhibit 1.) Similarly unsupported is the statement that NSO populations can persist and remain stable in heavily managed landscapes, and that owl populations will "fluctuate in approximate proportion to available habitat." (*See* comments of Alan Franklin and Peter Carlson, Exhibits 1 and 2.) Several conclusions are purportedly supported by "unpublished FWS data," which makes it impossible to review the legal sufficiency of the document.

The EIS/EIR also includes an unusually high threshold of significance for a listed species that the EIS/EIR admits is unstable and in decline: "substantial loss or degradation of occupied suitable habitat . . . assumed to result in substantial decline in population or restricted species' range." (EIS/EIR p. 3.10-92.) "Substantial decline" in turn is defined to mean falling below population viability goals in the NSO recovery plan. (p. 3.10-131.)

Applying this high threshold, the EIS/EIR concludes that any significant impacts on NSO would be adequately minimized and mitigated by the measures in the PALCO HCP. This

ELF-42 con.

conclusion is based on an incorrect characterization of the HCP. First, the EIS/EIR incorrectly states that under the proposed HCP, no direct take would occur because PALCO does not proposed to take nesting owls. This is untrue. Under the HCP, PALCO would only refrain from harvesting *existing, known* NSO nest sites for the first five years of the plan. If any of these sites are deemed "inactive" after only one year of non-use, such site may even be harvested prior to expiration of the initial five year period. Thereafter, PALCO can take more than one third of the existing baseline of NSOs before it must even *consider* implementing a "no take" strategy. Peter Carlson's and Alan Franklin's comments also explain how NSO populations could even drop below one third of the baseline before "no take" measures are instituted. This is clearly an unmitigated significant adverse effect.

Moreover, PALCO is only proposing to leave 18 acres protected around each NSO activity center. As Peter Carlson notes, this could lead to abandonment of such sites. In addition, only 10% of PALCO property will be maintained throughout the plan's 50 year life in suitable NSO habitat, which (contrary to the statement in the EIS/EIR) could include high and low quality habitat. Worse, as Alan Franklin and Peter Carlson point out, all or most of this allegedly "suitable" habitat could be concentrated in the RMZs, which do not provide suitable NSO habitat. This is wholly inadequate to mitigate the adverse effects of a substantial reduction in existing suitable NSO habitat on PALCO property by 57% to 66% or more.

The EIS/EIR contains a number of other conclusions regarding the significance of impacts and level of mitigation that are simply not credible are contradicted by expert review of the HCP and EIS/EIR, such as: (1) connectivity of suitable habitat would be provided through the RMZs; (2) the 33% level of authorized take is a "worst case" scenario that is considered "unlikely" given the mitigation and monitoring measures in the HCP; (3) the HCP is similar to previous strategies to maintain viable populations of NSO; (4) the HCP would exceed recovery plan goals for the area; and (5) 80% of the landscape would be maintained in nesting, roosting, foraging and dispersal habitat.

The EIS/EIR's conclusions also cannot be substantiated because they are based on insufficient information regarding the existing baseline (which is currently unidentified), and are based on a loose definition of "suitable habitat" that does not indicate whether mitigation will occur with high, medium or low quality habitat, and whether this habitat will be used primarily for nesting, roosting or foraging. (p. 3.10-53.)

Finally, the EIS/EIR includes several statements that contradict its own conclusions of mitigation to insignificance. For example, the document states that, of all the alternatives, the proposed action would result in the greatest net loss in suitable (high and medium quality) nesting habitat over the long term, and the greatest increase in habitat fragmentation. (p. 3.10-131, 3.10-134.)

The EIS/EIR also completely fails to analyze cumulative impacts, and improperly defers development of the "no take" strategy to a future date, without providing any performance standards or criteria for the reviewing public to judge the adequacy of the no take program in mitigating significant impacts on owls, in violation of CEQA and NEPA. (*See* 14 Cal. Code Regs. §§ 15126.4(a)(1)(B), 15130; 40 C.F.R. § 1508.7.) ELF-42 con.

In sum, the EIS/EIR fails to objectively, fairly and comprehensively evaluate the significant effects of the HCP on NSO populations in California and to develop adequate mitigation measures for these significant effects. Instead, the EIS/EIR relies on the self-serving and scientifically indefensible assumptions and conclusions in the PALCO HCP in a transparent attempt to justify approval of the proposed action. Thus, the EIS/EIR fails to serve its information disclosure purpose under NEPA and CEQA. The document must therefore be revised and recirculated to address the significant and unmitigated adverse effects of the HCP, as identified in these and other comments.

VI. EIS/EIR, Section 3.20: Additional Lands and Changed Circumstances

This section fails to adequately analyze the full range of potentially significant environmental effects of PALCO's acquisition of additional lands and future changed circumstances on the existing environment. ELF-43

A. Additional Lands

The EIS/EIR does not specifically describe the additional lands that could be acquired, but rather provides only the most general criteria which such lands must meet in order to be considered "covered lands" under the HCP and IA. There is not even a general description of habitat types and species occupying such lands. This is contrary to both CEQA and NEPA, which require a complete discussion of the existing environmental setting. (40 C.F.R. § 1502.15; 14 Cal. Code Regs. § 15125.)

Furthermore, the wholly inadequate description of additional lands provides no basis for the EIS/EIR's conclusion that the impacts of implementation of the HCP and IA on these lands would be similar to impacts on currently covered lands. This conclusion is arbitrary, capricious and without any evidentiary support in the record. The mere fact that the additional lands will be proximal to the existing lands, and the same activities will be authorized on those lands (which are only vaguely described), says nothing about the environmental impacts of those activities. These impacts are entirely dependent upon the type and extent of habitats and species, and habitat quality of the land in question, as well as other site-specific factors. Absent information regarding such factors, the environmental impacts of adding up to 25,000 additional acres to the HCP are impossible to analyze.

The statement in the IA that "extension of the HCP provisions to the additional lands will not result in impacts not analyzed and mitigated under the HCP and will not result in unauthorized take under the state and federal permits" is a mere legal conclusion in a contract. This statement in the IA in no way ensures that adverse impacts and unauthorized take will not occur by extending coverage of the HCP and IA to additional lands. ELF-43 CON.

The fact that the amount and timing of take on additional lands must be disclosed to the agencies also in way ensures that adverse impacts will be the same as those under the HCP. PALCO has every incentive to underestimate the amount of take, and given its past track record of falsifying information (*see* Marbled Murrelet v. Pacific Lumber Company), must be considered presumptively likely to do so.

Section 3.20.1 therefore must be revised to include a detailed description of the additional lands to which the HCP and IA may apply, and an objective, comprehensive analysis of the potential impacts of implementing the HCP and IA on these lands.

B. Changed and Unforeseen Circumstances

This section fails adequately to analyze the reasonably foreseeable impacts of changed circumstances which are *not* covered by the HCP (see comments in section III.B) and the impacts of unforeseen circumstances. Rather, the EIS/EIR just facilely reiterates the unjustifiable and unsupported conclusions in the HCP to support the conclusion no additional impacts would result, and no additional mitigation measures would be required due to changed or unforeseen circumstances. However, unforeseen circumstances are major events that by definition will have disastrous impacts on covered species. (*See* definition of "unforeseen circumstances" in IA.) ELF-44

Worse, consistent with the no surprises rule, there is no provision in the HCP or elsewhere for addressing the impacts of such unforeseen circumstance. Although the no surprises rule states that it is the federal government's obligation to address unforeseen circumstances, nowhere is this obligation guaranteed. Rather, under the no surprises policy, any additional mitigation will occur only if the federal or state government has the money earmarked in its budget for that particular fiscal year to pay for it, or is able to convince Congress and/or the State Legislature to appropriate the funds to do so (both unlikely scenarios). (*See* Anti-Deficiency Act, HCP Handbook, pp. 3-34 - 3-35; IA.)

Accordingly, the EIS/EIR should evaluate the availability of federal and state funds to meet any future mitigation requirements for species covered under the HCP. If the availability of federal and/or state funds is uncertain (a virtually foregone conclusion), then the EIS/EIR also must analyze the effects of PALCO's and the government's future unwillingness or inability to provide adequate mitigation for covered species if the HCP fails to achieve its mandatory goal

of preventing jeopardy to those species and adverse modification of designated critical habitat, and mitigating adverse impacts of the take to the maximum extent practicable.

ELF-44 CON.

VII. Conclusion

In sum, the HCP/SYP and EIS/EIR are legally inadequate and must be revised consistent with the comments herein. Unless and until these documents are revised to meet applicable legal standards and recirculated for public review and comment, the USFWS and NMFS cannot issue an ITP to PALCO, and CDF cannot approve PALCO's proposed SYP. To do so would be arbitrary, capricious, not in accordance with law, and an abuse of the agencies' discretion.

Thank you for your consideration of these comments. If you have any questions, please contact me at (510) 208-4555.

Sincerely,

Tara Mueller

Tara L. Mueller
Associate Attorney
ENVIRONMENTAL LAW FOUNDATION

On behalf of EPIC and the Sierra Club